

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

June 11, 1997

Paper No. 23

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Palladium Books, Inc.**

Serial No. 74/**395,149**

Lawrence R. Jordan of Seeligson & Jordan for Palladium Books, Inc.

Michael A. Szoke, Trademark Examining Attorney, Law Office
103 (Kathryn D. Erskine, Managing Attorney).

Before **Cissel**, Quinn and Walters, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On May 27, 1993, applicant applied to register the mark "TRIAX" on the Principal Register for "characters and items in books which contain rules and data for playing role playing games involving science fiction and fantasy adventures," in Classes 16 and 28. Use of the term as a trademark on the goods in interstate commerce was claimed since August 9, 1990.

The Examining Attorney noted that the Office had apparently misplaced the specimens submitted in support of registration, and asked applicant to supply additional

copies of the originals. A more definite identification of the goods on which the mark is used was also required. The Examining Attorney suggested "books featuring rules and data for role playing games involving science fiction and fantasy adventure." Applicant responded with an amendment changing the identification clause to "characters and items in books featuring rules and data for playing games involving science fiction and fantasy adventures." Three additional specimens, identical to those originally submitted, were included with the response. The specimens are copies of a soft-cover book one hundred and twenty pages long titled "RIFTS Sourcebook Number One."

The Examining Attorney rejected the amended version of the identification of goods clause and suggested the following: "books featuring rules and data for role playing games involving science fiction and fantasy adventures, characters and items." The specimens were held unacceptable on the ground that they do not show use of the mark as a source indicator, but rather show the term sought to be registered used to identify a character in applicant's books. New specimens were required by the Examining Attorney.

Applicant responded by adopting the suggested identification of goods clause and arguing that the original specimens do show the term used as a trademark for the goods set forth in the application, as amended. In support of its position, applicant submitted "a copy of the cover of a new

Palladium Books, Inc. product, the book entitled 'TRIAX and the NGR.' The title is shown in large print on the copy of the book cover, with "RIFTS WORLD BOOK FIVE" presented in smaller letters as a subtitle. Applicant conceded that this book was not published until after the application to register "TRIAX" had been filed, but contended that it is evidence that shows a continuation of applicant's use of the word as a trademark.

The Examining Attorney was not persuaded. He refused registration under Sections 1, 2 and 45 of the Act on the ground that the term sought to be registered does not function as a trademark for the goods set forth in the application, but rather identifies fictional subject matter discussed in applicant's books. The text in the specimens submitted with the application, "RIFTS Sourcebook Number One," makes repeated references to "Triax Industries" as an arms manufacturer in applicant's futuristic, war-torn world. Specific products of this fictitious enterprise are listed in the text, e.g., the "Triax T-21 Terrain Hopper Power Armor"; the "Triax X-500 Forager Battlebot"; and the "Triax DV-12 Dyna-Bot."

Referring to the previously submitted cover of the book titled "TRIAX AND THE NGR," applicant argued in response to the refusal to register that "applicant has continued its use of the mark 'TRIAX' to designate its products (in this case, a book) which contain stories relating to the above referenced fictitious arms manufacturer."

Applicant submitted a copy of its Fall 1994 catalog of books. On page six thereof is a listing for "Rifts Sourcebook Three: Mindwerks," which is described as "a companion to Triax and the NGR," which is also promoted in the same catalog. In that listing, Triax is referred to as "the high-tech industrial giant of the world," and "Triax" armor, tanks, aircraft and robot combat vehicles are listed as "highlights" of the book.

One copy of applicant's "Mindwerks Rifts Sourcebook Three" was also made of record. Additionally submitted was the declaration of applicant's president, Kevin Siembieda. Mr. Siembieda states therein that when the original specimens were submitted to the Patent and Trademark Office, he intended to have his corporation produce a book using "TRIAX" in its title, and that he intended the specimen submitted to use "TRIAX" as a trademark to designate applicant's stories about a fictitious arms manufacturer. He refers to the subsequently produced book, "TRIAX and the NGR," as well as the even more recent book, "Mindwerks," which he calls the second book in the "TRIAX" series. Further, he states that "it is likely that Palladium Books will produce additional works in the TRIAX series which will contain the trademark TRIAX in their titles."

The Examining Attorney made the refusal to register final, stating that the term sought to be registered does not function as a trademark for the books, but rather is used to refer to fictional subject matter in the books.

Applicant appealed concurrently with filing a request for reconsideration. Included with the request for reconsideration was additional evidence. The Board instituted the appeal, but suspended action on it and remanded the application to the Examining Attorney for reconsideration.

The additional evidence submitted with the request for reconsideration was a copy of a January, 1993 letter from one of applicant's customers, Joe Iglesias, of Annandale, Virginia. In the letter, he explains that he is fifteen years old, enjoys playing applicant's games, and had recently received a free promotional video game controller from a company called "Triax." The letter goes on to provide a copy of the promotional material which accompanied the device, and to direct applicant to "check it out yourself," and to get back to Mr. Iglesias quickly.

Applicant's contention was that it was "clear from the attached letter that the author (Joe Iglesias) confused a video game component from TRIAX Controls, Inc. with the goods offered by applicant under the trademark TRIAX."

Upon reconsideration, the Examining Attorney remained of the opinion that the refusal was proper, and the file was returned to the Board for action on the appeal. Both applicant and the Examining Attorney filed briefs, but an oral hearing was not requested.

The sole issue for resolution in this case is whether or not registration of the term "TRIAX" is barred by

Sections 1, 2 and 45 of the Act because the word does not function as a trademark for applicant's books. A careful evaluation of the record in this application leads us to conclude that the specimens submitted in support of registrability do not evidence use of "TRIAX" as a trademark for books. Instead, the term sought to be registered is used simply as the name of the fictional arms manufacturer. Even the additional materials submitted by applicant showing use of the term after the filing date of the application show the same thing: "TRIAX" is the name used in the text of applicant's books in reference to the fictitious weapons company, but "TRIAX" is not used as a trademark to indicate the source of applicant's books.

As the Examining Attorney correctly points out, contrary to applicant's arguments, there is only one specimen in this record, the soft-covered book titled "RIFTS SOURCEBOOK." The issue is whether this publication, which is the only evidence in the application record of applicant's use of the term sought to be registered before the application was filed, shows "TRIAX" used as a trademark for applicant's books. All the rest of the exhibits applicant subsequently submitted are not specimens of use, in that they do not show use prior to the filing date and are not supported by declarations to that effect. These exhibits can be used to establish how purchasers and potential purchasers of applicant's books might perceive the term, but the question remains whether the specimens of

record, the 1993 edition of the "RIFTS SOURCEBOOK," show use of the term as a trademark for applicant's books.

Just as applicant stated in the original language used in the application as filed, what the specimens show is that "TRIAx" is used in reference to "characters and items in books..." The specimens show the term used only in connection with the fictional company, and not as a trademark which identifies the source of the books themselves.

Further, none of the additional exhibits subsequently submitted could possibly be evidence showing how the use of "TRIAx" on the specimens would have been understood when the application was filed, because none of the exhibits was in existence at that time. Moreover, even if that were not the case, the exhibits do not support applicant's position. Instead, they show just what the specimens show, namely that applicant has used "TRIAx" only in reference to the fictitious "TRIAx INDUSTRIES" and its fictitious products, and not as a trademark for books.

The closest applicant can come to a plausible argument is with the March 29, 1994 submission of the cover from the book "TRIAx and the NGR." Applicant argues that the use of the term in this title is analogous to the situation in *In re Scholastic Inc.*, 23 USPQ2d 1775 (TTAB 1992), where use of a term in the titles of several books was held to demonstrate use as a trademark for books. That case is not analogous to the case now before us, however, because when

this application was filed, "TRIAX" had not been used as part of the title for a series of books; it had not yet been used as part of the title of even a single book. To date the record shows that the only book title to incorporate the term has been the aforementioned "TRIAX and the NGR," which was after the application's filing date. Applicant asserts that "'TRIAX' is used as a trademark for a series of games and stories by applicant" (brief, p.1), but the evidence does not show that the term was used as part of the title of any such book prior to the filing of the application.

Applicant's other main argument, that "the public recognizes 'TRIAX' services (sic) as originating from applicant," (brief, P.1), is likewise unsupported by the evidence. Applicant contends that the letter from young Mr. Iglesias shows that he confused the video game device with applicant's books, but the question is not whether he thought the controller was a book. A reasonable interpretation of the letter evidence would be that it indicates the writer's concern that the electronic device manufacturer had appropriated the name of applicant's fictional arms maker, but even if we adopt this analysis, it does not show that he was confused as to the source of either applicant's books or the video game controller, much less that he considers "TRIAX" to be a trademark for applicant's books.

In summary, neither the specimens nor the additional exhibits submitted by applicant show the term sought to be

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registered used as a mark to identify the source of
applicant's books. The refusal to register under Sections
1, 2 and 45 of the Act is accordingly affirmed.

R. F. Cissel

T. J. Quinn

C. E. Walters
Administrative Trademark Judges
Trademark Trial & Appeal Board

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